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Refusing to kill: Selective conscientious objection and professional military duties

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## **Refusing to kill: Selective conscientious objection and professional military duties**

*This paper explores the legal implications of objections of conscience against participation in particular military activities or conflicts (selective conscientious objection) as these are expressed by professional members of the armed forces. It does so by exploring how established human rights principles and norms related to the right of conscientious objection to military service may be extended to professional members of the armed forces seeking a discharge from military duties. The paper outlines applicable human rights standards relating to objections of conscience and compares how objections by professional members of the armed forces are dealt with by the judiciary in the United Kingdom and Germany. Finally, the paper uses empirical research data to map the recognition of selective conscientious objection to military duties in other member states of the Council of Europe that operate with fully professional armies and provides an extensive analysis of state practice identifying significant gaps, best practices and future challenges for the Council of Europe's member states.*

### **1. Introduction**

The relationship between professional service personnel<sup>1</sup> and the armed forces of a state is significantly different from the relationship between the state and conscripts, i.e. ordinary citizens liable for national military service for a defined period of time. Professional servicepersons enter into contracts of employment with the armed forces of their state and are expected to carry out specific contractual duties (Moskos 1977: 14). Conscripts, on the other hand, retain most of their rights as civilians when conscripted into the armed forces and cannot be regarded as 'volunteers', waiving their rights without their free and uninformed opinion (Rowe 2006: 32).

An objection to military activities can take two principal forms, either as an absolute or as a selective objection. An *absolute conscientious objection* is characterised by a general objection to military conflict where the person is willing to undertake a genuinely civilian service as an alternative form of national service, but is not willing to perform service that is in any way associated with the military services of the state. This is not to be confused with *total objection* which is used to describe situations where conscientious objectors object to any kind of mandatory national service, either military or alternative (PACE 1986: 7).

*Selective* conscientious objection concerns the selective opposition to participation in particular armed conflicts. Selective conscientious objection can be explained as a break away from core tenet of the pacifist ideology which declares an opposition to all forms of violence and the use of lethal force. Professional members of the armed forces that are already in service may experience greater legal challenges when confronted by serious moral dilemmas regarding their participation in military operations. The pacifist ideology does not accept that war can ever be justified; therefore the acceptance of claims of selective conscientious objection as a valid ground for discharge on grounds of conscience has been far more controversial than absolute conscientious objection (Allen 1946: 11). Allowing exemptions from military duties to acting military personnel expressing a selective objection to participation or deployment within specific conflict situations is possible in some states (Clifford 2011: 22), even though commentators have identified considerable problems in the processing of their claims (Wilson 2008: 665). This is evidenced by the large number of conscientious objection applications in states that participated in the US-led military intervention against Iraq, of which very few had been granted (Yoo 2003: 563).

Although governments may be reluctant to recognise a legal right to selective conscientious objection, perhaps owing to a fear that this could obstruct or negatively affect the morale

and consistency of their armed forces, one should not disregard that individuals with an ethically-driven objection to a particular military operation may have a genuine basis to support a discharge from military duties on grounds of conscience. The lack of clear guidelines providing for the exemption of individuals from military duties when selective conscientious objections arise, could lead to sentencing persons that may otherwise have a genuinely-held conscientious objection for disobeying a lawful command (Armed Forces Act 2006 Art 12; Lyons v R 2011).

## **2. International standards on selective conscientious objection**

It follows from the discussion above that domestic procedures for exemption from military duties on grounds of conscience may be more complicated for professional members of the armed forces than conscripts. This is due to the fact that those who are employed on a permanent basis in the armed forces of a state would need stronger evidence to establish that their beliefs changed while in service and that this forbids them from engaging in military activities, either in general or in particular military operations. It may however be argued that according to the recommendations of various international and regional human rights bodies, conscientious objections to military service may develop in military personnel while in service. In this regard, the Committee on Legal Affairs and Human Rights in its 2001 Report stated that *permanent* members of the armed forces should in certain circumstances also be able to apply for conscientious objector status (Committee on Legal Affairs and Human Rights 2001).

Similarly, in Recommendation 1518 (2001) the Parliamentary Assembly of the Council of Europe (hereinafter “PACE”) recommended that the Committee of Ministers invite those Member States that have not yet done so to introduce into their legislation, the right for

permanent members of the armed forces to apply for the granting of conscientious objector status (PACE 2001: 5).

The principle was endorsed by the Committee of Ministers in Recommendation No. CM/Rec (2010) 4 which provides the most advanced and detailed account of the rights of both conscripted and professional members of the armed forces. According to the recommendation, professional members of the armed forces should be able to leave the armed forces for reasons of conscience (PACE 2001: 42). The Committee of Ministers was influenced by the findings of the Organisation for Security and Cooperation in Europe (OSCE/ODIHR 2008: 46), which highlights that the application of the right to conscientious objection to persons who voluntarily serve in the armed forces is based on the view that an individual's deeply held convictions can evolve and that individuals voluntarily serving in armed forces may over time develop conscientious objection to bearing arms (Commission on Human Rights 2006).

The Explanatory Memorandum to Recommendation CM(2010)4 emphasises the changing nature of conscientious beliefs and provides that:

[...] a person's beliefs, either religious or philosophical, are not fixed in time and therefore the protection of freedom of thought, conscience and religious cannot be reduced to the time before joining the armed forces. A serviceperson's beliefs may also evolve when experiencing specific situations, notably in armed conflict. Professional members of the armed forces should have the right to make a request to leave the armed forces for reasons of conscience which should be examined within a reasonable time. Pending the

examination of such request, the requester should be transferred to non-combat duties where possible (CDDH 2010: H).

This Recommendation sets out a requirement that professional members of the armed forces should not be persecuted if they are holding a valid conscientious objection and should not be denied the opportunity to submit an application for exemption from military duties if such an objection arises. Yet, extending the protection of the right to professional members of the armed forces is a widely contested question within the member states of the Council of Europe.

The question whether the European Convention on Human Rights should extend to professional members of the armed forces is often a controversial matter at national level, particularly where military personnel are deployed to missions abroad. In *R(on the application of Smith) (FC) (Respondent) v. Secretary of State for Defence (Appellant) and another* [2010] UKSC 29, the UK Supreme Court did not find that individuals serving in the armed forces have the same Convention (ECHR) rights as civilians. The issue whether British soldiers killed during military operations abroad were, at the time of their deaths, within the jurisdiction of the United Kingdom for the purposes of Article 1 ECHR has been examined in *Allbutt, Ellis and Smith v MOD* [2012] EWCA Civ 1365, where the Court of Appeal on its decision of 19 October 2012 ruled that the claims under Article 2 should be struck out on the basis that the soldiers did not fall within the scope of the United Kingdom's Convention jurisprudence. The applicability of the Convention with regard to the right to a fair trial for particular groups, including soldiers and prisoners is also, according to the European Court of Human Rights, subject to the 'very nature of the offence in question'. In this regard, the case of *Campbell and Fell v. United Kingdom* (1984, para 71) makes a distinction between 'criminal' and 'disciplinary' offences for the purposes of the Convention. The unauthorised

absence of professional military personnel (i.e 'absence without leave' ('AWOL') or 'desertion') would give rise to a disciplinary offence that is subject to military rather than civilian scrutiny, even though the right to an effective appeal to a civil tribunal is safeguarded by international and regional human rights treaties.

### **3. An overview of state practice within the Council of Europe member states**

The last two decades have seen the recruitment of fully professional military personnel to replace conscripted armies, with the overwhelming majority of Council of Europe Member States transitioning from conscripted to professional armies since 1995. At present, almost two thirds of the Council of Europe member states operate with fully professional armies. The rights of professional staff members and, in particular, the right to be discharged from military service on grounds of conscience for those who voluntarily join the armed forces on their own free will for a fixed or indeterminate period of time has drawn the attention of the Committee of Ministers of the Council of Europe, which acknowledged in one of its Recommendations, that members of the armed forces do not surrender their human rights and fundamental freedoms upon joining the armed forces (CoM (2010)4: 21) .

The question of the recognition of the right to conscientious objection for professional staff members of the armed forces remained unexplored until 2006, when PACE adopted Recommendation 1742 recognising that the ending of conscription and the professionalisation of the armed forces in several countries created new needs. It thus requested that the Council of Europe promote respect for human rights within the army ranks and increase human rights awareness among their own military personnel (PACE 2006: 3). Most recently in 2010, the Committee of Ministers' Recommendation added emphasis on the need to ensure that the governments are complying with the principles set

out in the Council of Europe's recommendations both in law and practice, not only in relation to conscripts but also in relation to the civil, political and economic rights of professional members of the armed forces.

In Member States which have transformed their armed forces to employ all-volunteer professional personnel, the dissemination of information regarding the rights of armed forces personnel and particularly the right to conscientious objection is less frequent, particularly due to the fact that a legal framework has not yet been established to envisage such a right for professional members of the armed forces.

In the Republic of Ireland there is no procedure set out for the examination of applications for exemption based on conscientious grounds. On the other hand, in the Netherlands, professional members of the armed forces are informed of their rights at the initial training for all personnel, as part of the curriculum for basic training. In Portugal, while conscription was in place, citizens were adequately and mandatorily informed by the Cabinet of Civil Service of Conscientious Objectors, local municipalities and recruitment centres, of the rules and requirements of the Law on Conscription at the time of conscription and before incorporation and admission to the Armed Forces. However it is unclear whether professional servicepersons in Portugal are currently informed in their contracts of the possibility of terminating their contract on a conscientious basis. In Slovakia, information on the rights and obligations of military personnel are available through the military administrative offices in military units and facilities, and in electronic form through the website of the Ministry of Defence. In Slovenia, professional members of the armed forces are informed of their rights and the procedures available to exercise them before enlistment in the Slovenian Armed Forces.



The principle stipulating that professional members of the armed forces should have the right to be discharged from their duties if they developed a genuine conscientious objection, has not yet been well-accepted by the majority of the Member States of the Council of Europe. At present, only six out of the twenty-seven Member States with professional armies recognise such a right either by legislation or through domestic policies and procedures.<sup>2</sup> These are the United Kingdom, Germany (right to conscientious objection protected under the German Constitution), the Netherlands, Portugal, Sweden and Switzerland.<sup>3</sup> Various domestic bodies have suggested that professional members of the armed forces may be able to withdraw from their contract on compassionate grounds, not necessarily having to prove that they have an objection of conscience. This may justify the considerably small number of applications made on grounds of conscientious objection in the Council of Europe member states. In this regard, the French Board member of the European Bureau of Conscientious Objection has submitted that the French authorities rarely receive applications for exemption on grounds of conscience by professional members of the armed forces. It may thus be argued that the number of applications for exemption from military duties on grounds of conscience has been reduced where transition from conscription to fully professional armies took place due to the existence of alternative grounds or options for objectors.

### **3.1. Selective conscientious objection in the United Kingdom**

Conscription has been suspended in the United Kingdom since 1963. The right of conscientious objection for professional members of the armed forces is provided in

administrative procedures for each of the three services of the British armed forces, i.e. the Army (Instruction 006), the Royal Navy (Order 0801) and the Royal Air Force (AP3392 vol. 5, Leaflet 113).<sup>4</sup> Claims are handled administratively in the applicant's chain of command. These procedures are not statutory regulations, but procedures for administrative action and are therefore not found in either primary or secondary legislation. A discharge can be made on compassionate grounds but the availability of this right is not reflected anywhere in the call-out materials received by professional servicemen, including the 'terms of service' for each of the three categories. In addition to this, access to the procedure for registering a conscientious objection is largely unknown to serving personnel (ForcesWatch, 2013). The Explanatory Memorandum to the Armed Forces (Enlistment) Regulations of 2009, calls for these procedure to become more visible, because, as the Memorandum explains, making the regulations on enlistment more visible by including them in a statutory instrument ensures not only that they are properly scrutinised, but also that they are published and that servicemen may easily ascertain their rights and obligations.

In *Khan v RAF* [2004], concerning the refusal of a reservist to serve at the time of the invasion of Iraq, the appellant was charged with the offence of being 'absent without leave' since he did not submit any documents explaining to the Royal Air Force that he had a conscientious objection to the said service. The High Court accepted that the 1997 Regulations were accessible, even if their effect had not been expressly made part at the stage of call-out of the reservist (the appellant), nevertheless it emphasised that 'the call-out materials in this case, like the 1997 Regulations, do not mention conscientious objection expressly. In that respect, it would seem that the information provided to the recalled reservist could be improved.' (*Khan v RAF*, para 57). While acknowledging the practical issues created by the absence of a clear legal framework regulating objections made on grounds of conscience, the Court maintained the view that the regulations are practically

effective and can therefore protect a person wishing to be discharged on grounds of conscience, provided that a sincere and genuine claim is held by the applicant.

The Court in *Khan* had dismissed the claim that conscientious objection was protected under Article 9 ECHR. The position of the European Court of Human Rights had not been determined, as the Council of Europe had not yet engaged with the question of extending the right of conscientious objection for professional members of the armed forces.

Furthermore, the decision in *Khan* predates both Recommendations 2006 and CM(2010)4.

A genuine conscientious objection in the UK Forces results in a discharge on compassionate grounds. If the claim is dismissed by the superior officer handling the application, there is a right to appeal to an independent public authority dissociated from the Ministry of Defence, the Advisory Committee on Conscientious Objection (ACCO).<sup>5</sup> To ensure the independence and impartiality of the authority, hearings are held in public, in premises away from the Ministry of Defence. If the Committee decides that the applicant does not have a valid objection on grounds of conscience, then the person concerned is still subject to complying with the terms of their employment, and must therefore continue their service until completion of their contract.

Issues regarding the availability of information on the right and the means of acquiring conscientious objector status have been identified by NGOs. One of these issues concerns the sentences imposed to servicemen for whom the claims for recognition as conscientious objectors may be rejected by the military chain of command. According to Forces Watch, the Armed Forces are the only employers in the United Kingdom who legally require their employees to commit themselves for several years, with the risk of a criminal conviction if they try to leave sooner.

In the case of *Lyons v R* [2011], a Royal Navy medical advisor refused to undertake arms training for his imminent deployment to Afghanistan, after he was informed at a medical training event that in his deployment to Afghanistan he should not waste resources in treating civilians. He formed the view that his involvement in this war was wrong and admitted that he had been influenced by what he had read in the press, which led him to believe that his participation would result to accountability for civilian casualties (*Lyons v R*, para 8). His argument was deemed by the Advisory Committee on Conscientious Objection ('ACCO') and the Martial Appeal Court to be a *political* objection to a particular military engagement and not a genuine conscientious objection to all forms of war. Nevertheless, his Commanding officer supported the application and concluded that the appellant's claim was genuine (*Lyons v R*, para 18). The applicant was therefore convicted by a Court Martial at Portsmouth for intentionally disobeying a lawful command contrary to Section 12(1)(a) of the Armed Forces Act 2006. He was sentenced to seven months' military detention, reduction from the rank of Leading Medical Assistant to Able Seaman and dismissal from the service.

He appealed the decision and his case was considered by the Martial Appeal Court, which ultimately rejected his appeal on the basis that he had volunteered for military service, and so voluntarily accepted the responsibilities which go with such service, including the risk of deployment in a dangerous situation. The Martial Appeal Court stated that if such an objection was allowed, this could put at immediate risk the lives of comrades, the success of the operation and the safety of the civilian population, while it was also emphasised that training on the use of arms was an operational requirement imposed for the protection of service personnel and those under their care (*Lyons v R*, para 35). Even though the applicant was a medical assistant and arguably had protected status under the terms of the

Geneva Conventions, the policies of the Ministry of Defence required weapons training for defence purposes and for the protections of the persons being under his medical care, regardless of whether his claim for discharge on conscientious grounds would succeed.

The Martial Appeal Court was cautious to avoid setting a precedent that would allow members of the Armed Forces to refuse participation in conflict zones. Allowing soldiers to invoke political arguments and disobey lawful orders by requesting to opt out from particular military operations or training sessions on the basis of their beliefs was deemed to be dangerous to the cohesiveness and discipline that is required by service personnel. It has to be emphasised that the appellant was not sentenced for having expressed a request for discharge on grounds of conscience, but for ‘disobeying a lawful command’ to undertake weapons training, which is significantly different to disobeying a command that would require him to be engaged in warfare. As Deakin observes, military courts have been unwilling to accept ‘conscience’ as the issue and prefer to examine the issue of selective conscientious objection on military grounds such as obedience of orders (Ellner et al 2014).

### **3.2. The case of Germany**

The situation in Germany with regard to the applicability of the right of conscientious objection to professional members of the armed forces is rather different. Under German law, the right of conscientious objection is a fundamental right of every citizen and is safeguarded by the German Constitution (*Grundgesetz*, Art 4(3)). The right to conscientious objection is being recognised to both conscripts and professional members of the armed forces.<sup>6</sup> The right is enshrined in Article 4(3) of the 1949 Basic Law and Art 2(6) of the 2003 Law on Conscientious Objection which made the law applicable to both conscripts and professional soldiers and provided for alternative community service.

Additional provisions for the application of the right to professional soldiers were laid down by a decree issued on 21 October 2013, which stipulated that the procedure for the submission of applications for exemption on conscientious grounds was administratively independent from the German Military Forces.

In Germany, national military service was suspended in July 2011. As a result, the responsibility for examining applications for exemption from military duties on grounds of conscience by professional servicemen lies with the Federal Office for Family and Civil Duties. With the suspension of conscription in 2011, the Federal Office of Civilian Service (formerly part of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth), the body responsible for the control and administration of alternative civilian service for conscientious objectors was re-organised and renamed as 'Federal Office of Family Affairs and Civil Society Functions' ('BAfzA'). BAfzA took responsibility for the control and administration of a new type of voluntary social service for both men and women (Bundersfreiwilligendienst). In essence, this type of service fulfils the roles previously undertaken by conscientious objectors in hospitals, retirement homes, emergency medical services and public utility institutions in the fields of ecology, culture and sports. The voluntary civilian service has a duration of no less than six, and no more than eighteen months, while volunteers receive an allowance of at least 335 euros per month, free health, accident and liability insurance, contractually regulated holidays and accompanying seminar days (Federal Volunteer Service 2013). In its first year, the service could enlist at least 30,000 volunteers, whereas the target in 2012 was raised to 35,000, according to information provided by the Federal Office of Family Affairs and Civil Society Functions.

Since the suspension of national military service, the German Armed Forces are liable for the administration of three types of military service: the "Soldatenim Freiwilligen

Wehrdienst' ('FWDL') where volunteer soldiers are required to perform military service of up to twenty-three months; the 'Soldaten auf Zeit' ('SaZ') where soldiers volunteering for service have signed up for a period between two and twenty years; and finally, the 'Berufssoldaten' which includes professional soldiers without time restrictions in their contracts. The constitutional right to conscientious objection, as enshrined in Article 4(3) of the Constitution still applies to all the aforementioned categories of volunteers and for professional members of the armed forces.

Although German legislation makes no explicit reference to *selective* conscientious objection by professional soldiers, a case decided by the Federal Administrative Court of Leipzig in June 2005 shed some light on the selective objection controversy (BverwG 2 WD, 21 June 2005). The case concerned the refusal by a professional soldier, Major Florian Pfaff, to operate software developed by the military and to obey military orders of his senior officers in fear that he would have served the 'unlawful' (as he perceived it) participation of Germany in the war against Iraq. On 27 March 2003 he informed his colleagues that his refusal to contribute to the military intervention against Iraq stemmed from the view that any participation would have violated fundamental rules of international law. He subsequently refused to follow the orders of his Superior and as a result, on 9 February 2004 he was disciplined and demoted to the rank of Captain by a Military Disciplinary Tribunal. The applicant appealed against this decision before the Federal Administrative Court of Leipzig ('*Bundesverwaltungsgericht*'), arguing that he should be acquitted from disobeying an order on the basis that he had serious reservations with regard to the legality of Operation Iraqi Freedom, and that he should be allowed to exercise his right to freedom of conscience as protected by the German Constitution. The Federal Administrative Court delivered a ground-breaking judgment, acquitting the soldier and held that the soldier's

right to freedom of conscience required that he be offered alternative tasks that were not related to a way that he had reasonably believed to be illegal (Baudisch 2006: 911).

It was noted that, even if the soldier had not formed a clear view with regards to the legality of the military intervention against Iraq, some credible doubts existed with regards to the legality of the intervention from a public international law perspective (BverwG 2 WD, para 4.1.4.1.). While the Court avoided expressing a conclusive opinion on the legality of the intervention, it is important to observe that the Court focused on the Constitutional right of freedom of conscience, noting that this should be respected and that the Armed Forces should allow its members to undertake an alternative type of action, including duties of alternative civilian service, in order to ensure that objections of conscience are reasonably accommodated (BverwG 2 WD, para 4.2.4.4.). It was expressly stated that if an individual has doubts about the legality of military intervention, and consequently, his conscience is in conflict with the obligation to carry out superior duties, the concerned individual is not under a strict obligation to follow orders, even though he has to explain his objection and establish that such an objection is based on serious and truthful considerations. This allows for a reversal of the burden of proof; i.e. it is not the soldier who has to prove that his refusal to follow orders was lawful, but it is for the government to adduce evidence to prove that the military action does not violate principles of public international law and/or the German Constitution (BverwG 2 WD, para 4.1.5.3.2.).

The decision of the Court to find that the soldier was excused from following superior orders and was entitled to an 'alternative course of action' ('Handlungsalternative') that did not affect his conscience (BverwG 2 WD, para 4.1.2.5.) is important for two reasons. First, it provides an interesting commentary and legal analysis into the arguments related to the legality of the US-led military operation in Iraq. Second, it reiterates the importance of the



constitutional protection of the right to conscientious objection in German law that is still strongly defended by the judiciary and applied to professional members of the armed forces even in cases where the decisions of the executive are contested at judicial level by members of the armed forces.

The German case may be usefully contrasted with the British case of *Lyons*, where the UK Court of Appeal held that the appellant's objection was based on a political opinion on the lawfulness of the US-led intervention in Afghanistan. This may suggest that the United Kingdom give more emphasis to ensuring obedience to the policies of the armed forces, and consequently overlooking questions regarding the legality of an intervention or participation in a military intervention. The UK Ministry of Defence is of the view that 'service personnel are fully committed to giving their best in defending our country and its allies; this includes the requirement to bear arms and accept all assignments and deployments'. The latter suggests that military personnel in the United Kingdom are required to refrain from making a conscientious decision regarding the disputed legality of an operation (Steyn 2001; Qureshi 2004) and refuse to take part in a conflict which they consider unlawful, either because it has not been given an express or implied authorisation by the United Nations, or when there are doubts as to customary principles of international law being violated, as a result of such an intervention. As the judgment in *Lyons v. R* indicates, there is still a strong perception regarding obedience of orders as an indispensable characteristic of military discipline that may be trumped by the right of military personnel to make conscientious decisions and refuse to comply with a military order regarding their involvement in particular operations.

### 3.3. The Netherlands

The Kingdom of the Netherlands suspended conscription in 1997. The Constitution still contains an obligation for conscription but in practice the Dutch Armed Forces consist of voluntary service members only. While conscription was in place, the right of conscientious objection was guaranteed by Article 99 of the Constitution of the Netherlands which States that 'exemption from military service because of *serious conscientious objections* shall be regulated by an Act of Parliament'.

Article 2 of the 1962 Law on Conscientious Objection for Service Members defines conscientious objections as 'insurmountable conscientious objections to the personal fulfilment of military service in connection with the use of force in which a person in the fulfilment of his service can be involved'. Some parts of the law have now been suspended and consequently the fulfilment of civilian service is not applicable to professional members of the armed forces. However, professional members can still invoke Article 9(3) of the 1962 Law on Conscientious Objection for Service Members to be recognised as conscientious objectors and be discharged from the Armed Forces as soon as possible. Professional members are informed of their rights and procedures available to exercise them at the initial training for all serving personnel, as a part of the curriculum for basic training. According to the Dutch Ministry of Defence, there have been no cases of conscientious objection by voluntary service personnel since 1997. The procedure for application is outlined below.

The procedure for the submission of applications is not substantially different from the procedure applying to conscripts before the suspension of military service. The Ministry of Defence initiates an inquiry into the objections of the applicant, which is carried out by one or more members of the Advisory Commission, under the administration of the Ministry of

Defence. The members of the Commission are appointed and dismissed by Royal Decree and the applicant is given the opportunity to represent himself and give evidence before a formal decision is made, and before forwarding their decision to the Minister of Defence. According to the Ministry of Defence, voluntary service personnel with conscientious objections can apply for an honourable discharge, without any obligation to give the reasons for their refusal. If the Minister rejects the application, there is a right to appeal to the Advisory Commission which conducts an investigation with at least three of its members. Upon a third dismissal of the application, there is a right to appeal to the department of administrative law of the Council of State (1962 Law on Conscientious Objection, Article 7(b)), which gives the applicant the opportunity to appeal the decision before an impartial tribunal that is dissociated with the Ministry of Defence.

In relation to partial conscientious objections to particular military operations, even though conscientious objections are traditionally acknowledged as ‘grave objections against all forms of armed service’, the Ministry of Defence is of the view that voluntary service personnel may apply for an honourable discharge for military service if their involvement to a particular military operation is at odds with their conscientious beliefs. An honourable discharge would have the same effect for both total objectors and partial objectors, since there would be no alternative offered to a professional serviceman in the same extent that it would be offered for a conscript being released of his military obligations, therefore a discharge may be obtained without the obligation to reveal the reasons.

### **3.4. Portugal**

Finally, Portugal abolished national military service in 1999 with Law 174/1999 in order to reform its armed forces and transform them into a fully professional army. The right of

conscientious objection to military service is a constitutional right, recognised under Article 41(6) of the Portuguese Constitution which States that ‘the right to be a conscientious objector, as laid out by law, shall be guaranteed’. According to Article 276(4) of the Constitution, ‘conscientious objectors who by law are subject to the performance of military service shall perform civic service with the same duration and degree of arduousness as armed military service’. In 2009, the NGO ‘War-Resisters International’ submitted that Portugal did not recognise the right of conscientious objection to professional members of the Armed Forces (Speck 2007), which was confirmed in 2011 by the European Bureau for Conscientious Objection (EBCO 2011). However, according to the Portuguese Ministry of Defence ‘while there is no norm that expressly establishes the right to conscientious objection by military personnel of the Armed Forces, any citizen regardless of being military personnel or not, can initiate the procedure by which the right is recognised, there being no limitations to its use on military personnel’. This means that the same application procedure that was established by Law no. 7/92 on Conscientious Objection which regulates the question of conscientious objection, can still be read in conjunction with the Law on Military Service (Law no. 174/99 of 21 September 1999, as amended by Law no. 1/2008 of the 9 May 2008), by a professional serviceman wishing to withdraw on grounds of conscience.

A provision is found in Act No. 6/85 as adopted by the Portuguese Parliament on 4 May 1985, granting conscientious objector status ‘to those whose convictions, whether they are based on religious, moral or philosophical grounds, forbid them to use force against other human beings’ (PACE 1986). Furthermore, according to Article 2 of Law 7/1992 establishing who can object and on what grounds, ‘conscientious objectors are considered as those citizens who believe that for religious, moral, humanistic or philosophical reasons, they cannot legitimately employ violent means of any kind against any person, even for the

purpose of national, collective, or personal defence'. It would seem from a literal interpretation of the law that legislation accepts only absolute conscientious objection to all forms of violence against others, therefore a *selective* objection to particular military operations would probably not be accepted. Professional members of the armed forces deciding to withdraw from their services on grounds of service are required to terminate their contract if the objector is working in a contractual or voluntary basis or through a request for resignation as permanent staff.

According to the Portuguese Ministry of Defence, there are no implications or consequences for members of the Armed Forces who terminate their service with the Armed Forces on the grounds of conscientious objection, as the legal effects of such a situation are exactly the same as those for members of the Armed Forces who terminate their service on any other grounds or legally admitted reasons.

#### **4. Conclusion**

This paper has argued that a limited number of Council of Europe member states allow members of the armed forces to be released from their contractual duties on grounds of conscience. Resignations particularly on grounds of conscience are not envisaged in domestic legislation in the majority of states and therefore claims may be brought on different grounds to terminate employment. Resignation may be possible even when an application for discharge is rejected by the armed forces, since in most jurisdictions, a decision would be subject to some form of judicial review. Nevertheless as discussed in the detailed empirical analysis above, it is possible that requests for exemptions from particular military duties on the basis of a genuine conscientious objection can be accommodated as indicated by the German model, where the constitutional right to conscientious objection

was extended to the case of a soldier who selectively opposed to be engaged in a particular military operation on grounds of conscience. Since selective conscientious objection assumes the legitimacy of some types of military action, states should maintain some discretion as to how requests for exemption are to be accommodated. The decision of the German Federal Administrative Court in *Pfaffer* will most likely come to the forefront of academic debate over the applicability of conscientious objection standards to professional members of the armed forces.

## NOTES

1. The term 'professional members of the armed forces' is used to describe professional service personnel that join the armed forces of their own free will, voluntarily choosing to pursue a military career for a fixed or indeterminate period of time.
2. A survey conducted by the author, based on information received by competent Ministries across the Member States of the Council of Europe, indicates that only a small number of Member States recognise a right of selective conscientious objection to particular military operations in their legislation. The governments of the United Kingdom and Croatia stated that although they do provide for a right of selective conscientious objection or recognise the term in their national laws, applications may be considered on their individual merits and an honorary discharge or early termination of contract may be granted on compassionate grounds. Germany allows for selective conscientious objections if it is demonstrated that a military intervention may be in conflict with customary rules of international law, however this is not stipulated in national legislation on conscientious objection.
3. Information obtained by the author, provided by the Republic of Ireland, C&A Branch (Entry and Promotion); Ministry of Defence of the Netherlands, Directorate of Legal Affairs – Department of International and Policy Issues; Portuguese Ministry of National Defence (General Director); Ministry of Defence of the Slovak Republic, Defence Policy, International Relations and Legislation Department (Human Resources Policy and Strategy Section); Embassy of the Republic of Slovenia in London ([www.london.veleposlanistvo.si](http://www.london.veleposlanistvo.si)); Portuguese Embassy in London upon communication with the Ministry of National Defence, Reference No. 10.11 Proc. 1/2012, V/Oficio n.886; Germany-Bundesamt für Familie und zivilgesellschaftliche Aufgaben (Federal Office of Family Affairs and Civil Society Functions); German Federal Office for Family and Civil Duties; UK Ministry of Defence (Deputy Chief of Defence Staff (Personnel and Training) Secretariat; EBCO (European Bureau of Conscientious Objection); Friedhelm Schneider, EBCO President.
4. The United Kingdom has a tripartite system of recognising the right of its professional members of staff to seek discharge on grounds of conscience. These are provided in the following domestic procedures. For members of the territorial army: AP3392 vol. 5, Leaflet 113, Procedure for Dealing with Conscientious Objectors within the Royal Air Force; For all members of the Royal Navy: Personnel, Legal, Administrative and General Orders 0801, Application for Discharge on Grounds of Conscientious Objection. For all members of the Regular, Territorial and Reserve Forces: Instruction 006 – Retirement or Discharge on Grounds of Conscience.
5. According to the British Ministry of Defence, 'the ACCO was established in 1970 to hear appeals from Service personnel whose applications to leave the Service on grounds of conscience have been rejected by the Service Authorities. Members of the ACCO are appointed by the Lord Chancellor. The panel consists of 8 individuals, of whom the Chairman and the Vice and Deputy Chairman must all be Queen's Counsel. A quorum for a meeting of the Committee is a chairman together with two lay members. Hearings are held in public, and the procedure is informal. There is no wearing-in of witnesses, and, although the witnesses and the appellant may be questioned, there is no cross-examination. Information obtained by the author, provided by the British Ministry of Defence (Deputy Chief of Defence Staff (Personnel and Training) Secretariat, 31 January 2012.

6. In 2011, 1.398 German soldiers (406 temporary soldiers and 4 professional soldiers) demanded to be recognised as conscientious objectors. In the same year 1.171 soldiers have been granted conscientious objectors status. Information obtained by the author, provided by Friedhelm Schneider, EBCO President, 5 September 2012.



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